IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2023 05208

ROSS ANDREW GAWLER — Plaintiff

v

FLEETPARTNERS GROUP LTD (ACN 131 557 901) — Defendant

JUDGE:	Waller J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 May 2024
DATE OF RULING:	26 June 2024
CASE MAY BE CITED AS:	Gawler v FleetPartners Group Ltd
MEDIUM NEUTRAL CITATION:	[2024] VSC 365

GROUP PROCEEDINGS — Costs — Application for a group costs order — Costs to be calculated as a percentage of the amount of any award or settlement recovered — Whether the Court should make the group costs order — Whether proposed percentage appropriate or necessary to ensure that justice is done in the proceeding — Whether 'appropriate or necessary' should be read disjunctively or conjunctively — Exercise of discretion — Principles to be applied — Application granted — *Supreme Court Act 1986* (Vic) s 33ZDA — *Fox v Westpac Banking Corporation* (2021) 69 VR 487 — *Bogan v Estate of Peter John Smedley (Deceased)* [2022] VSC 201 — *Nelson v Beach Energy Ltd* [2022] VSC 424 — *Allen v G8 Education Ltd* [2022] VSC 32.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms FK Forsyth KC with Mr TL Bagley	Phi Finney McDonald
For the Defendant	Ms WA Harris KC with Mr TP Diaz	Herbert Smith Freehills

HIS HONOUR:

A. INTRODUCTION

1 This is a group proceeding brought under Pt 4A of the *Supreme Court Act 1986* ('**Act**').

2 The representative plaintiff, Dr Ross Gawler, brings his claim against ASX-listed company FleetPartners Group Ltd, formerly Eclipx Group Ltd ('**Eclipx**'), a provider of fleet car, equipment finance and management services to customers in Australia and New Zealand. The group members are, in simplified terms, persons who acquired an interest in Eclipx shares between 8 November 2017 and 20 March 2019. The plaintiff claims loss and damage, alleging that Eclipx engaged in misleading or deceptive conduct, made misleading statements and breached its obligations of continuous disclosure to the market about its financial performance, future earnings guidance and its systems and processes for recognising and forecasting revenue. The claims are disputed by the defendant.

3 By summons filed on 25 April 2024, the plaintiff seeks a group costs order ('**GCO**') pursuant to s 33ZDA of the Act for the legal costs payable to his solicitors, Phi Finney McDonald Pty Ltd ('**PFM**'), to be calculated as 39% of the amount of any award or settlement that may be recovered in the proceeding.

4 In support of his application, the plaintiff relies on:

(a) the affidavit of Dr Gawler affirmed 24 April 2024 ('**Gawler Affidavit**');

(b) the affidavit of Mr Timothy Finney, a Director and Principal Lawyer of PFM, affirmed 24 April 2024 ('**First Finney Affidavit**');

(c) the affidavit of Mr Finney affirmed 6 May 2024; and

(d) the plaintiff's submissions in support of his application for a group costs order filed 25 April 2024 ('**Plaintiff's Submissions**').

5 Consistent with usual practice, the defendant neither consents to nor opposes the plaintiff's application.

6 For the reasons set out below, I am satisfied that making a GCO in the terms sought is appropriate and necessary to ensure that justice is done in this proceeding.

B. CONFIDENTIALITY

7 On 22 April 2024, I made orders granting leave for the plaintiff to redact any material over which he makes a claim for confidentiality. The plaintiff filed redacted versions of the material listed in paragraph 4 above and provided unredacted versions to chambers for the Court's use only. The question of whether the plaintiff is entitled to maintain confidentiality claims over any materials on a permanent basis was reserved for determination at the hearing of the plaintiff's summons.

8 At the hearing, the plaintiff did not press particular confidentiality claims previously made and otherwise sought orders pursuant to rr 28.05(4) and 28A.06(1) of the *Supreme Court (General Civil Procedure) Rules 2015* for some material to be made permanently confidential and some material to remain confidential unless and until the Court makes a GCO in the terms sought by the plaintiff or the proceeding is discontinued. The defendant did not oppose the orders sought in principle.

9 I made the confidentiality order as sought by the plaintiff. The plaintiff immediately provided the defendant with revised versions of his material redacted in accordance with that order.

10 Although I have determined to make a GCO in the terms sought by the plaintiff in this application, significant portions of the plaintiff's material remain redacted and confidential. These reasons accordingly avoid reference to the confidential material. A confidential annexure, setting out such material as is relevant to the Court's reasoning will be published to the plaintiff.

C. APPLICABLE LAW AND PRINCIPLES

11 Section 33ZDA of the Act provides:

> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
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> (a) that the legal costs payable to the law practice representing the

plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(2) If a group costs order is made—

(a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(5) In this section—

group costs order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

12 Section 33ZDA was inserted into the Act by the *Justice Legislation Miscellaneous Amendments Act 2020* in response to recommendations made by the Victorian Law Reform Commission.[1] Section 33ZDA is novel and unique to Victoria among Australian jurisdictions.[2] Prior to its introduction, the manner by which legal costs were supervised in group proceedings was essentially the same as in other Australian jurisdictions — Part IV of the Act largely replicating Part IVA of the *Federal Court Act 1976* (Cth). In particular, courts often relied on the 'gap-filling' power conferred by s 33ZF, which provides:

> In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court

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1 Explanatory Memorandum, Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) 2 ('**Explanatory Memorandum**'); Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4590 (Jill Hennessy, Attorney-General and Minister for Workplace Safety) ('**Second Reading Speech**'); Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings Report* (Report, March 2018) ('**VLRC Report**').

2 *Bogan v Estate of Smedley (Deceased)* [2023] VSCA 256, [4] (Ferguson CJ, Niall and Macaulay JJA) ('***Bogan (Appeal)***').

thinks appropriate or necessary to ensure that justice is done in the proceeding.

13 In concurrence with the growth of third-party litigation funding as a model for managing the high costs of litigating group proceedings, courts used s 33ZF to develop a number of mechanisms to supervise legal costs in group proceedings and ensure that the costs of bringing a group proceeding are fairly distributed among group members at settlement. One such mechanism is a 'common fund order', which is an order requiring group members to contribute to the litigation funder a percentage of any settlement or judgment in their favour, regardless of whether a particular group member had entered into a funding agreement with the funder.

14 In *BMW Australia Ltd v Brewster*,[3] the High Court held that s 33ZF of the *Federal Court of Australia Act 1976* (Cth) and s 183 of the *Civil Procedure Act 2005* (NSW) (both cognates of s 33ZF of the Act) do not empower the Federal Court of Australia or the Supreme Court of New South Wales, respectively, to make interlocutory common fund orders. Chief Justice Kiefel, Bell and Keane JJ stated:[4]

> These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.

15 While such orders may still be made upon settlement of a proceeding,[5] *Brewster* has left Victoria in a unique position as the only Australian jurisdiction where a mechanism similar to an interlocutory common fund order is expressly allowed by statute. As explained by the Court of Appeal in *Bogan (Appeal)*:[6]

> Section 33ZDA(1) addresses the relationship between lawyer and client and also between lawyer and group members who may or may not be in a contractual relationship with the law practice. Through the mechanism of a GCO a law practice is in a position to both fund the litigation and benefit from

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3 (2019) 269 CLR 574 ('***Brewster***').

4 Ibid 589 [3] (emphasis in original).

5 *Elliott-Carde v McDonald's Australia Limited* [2023] FCAFC 162, [99] (Beach J), [408] (Lee J), [504] (Colvin J).

6 *Bogan (Appeal)* (n 2) [51]–[53] (Ferguson CJ, Niall and Macaulay JJA).

> it beyond recoupment of ordinary professional costs. The financial risk of conducting the litigation is able to be shifted from the group members to the law practice. In some respects, a GCO is similar to a common fund order ('CFO'), which enables a funder to obtain a percentage of any settlement or award, but the law practice stands in a different position to a third party funder. The law practice, and the lawyers engaged in acting in the group proceeding, have a role in the proceeding providing legal representation to their clients; they have duties to both the court and their clients. They are not in the same position as an independent third party who purely funds the litigation. …
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> …
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> The court may only make a GCO if it is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. It must follow that, in regulating an aspect of the lawyer-client relationship, and the measure of the potential return to the law practice, the section expressly recognises that the order may be necessary to ensure justice is done in the proceeding. It may reasonably be inferred from the text and structure of s 33ZDA that a purpose of a GCO is to put in place a funding mechanism that allows the group members to be represented and for the matter to proceed and that whether the proceeding proceeds as a group proceeding may be a matter that may engage the interests of justice in the proceeding. In other words, s 33ZDA embodies a legislative judgment that, in some cases, it may be in the interests of justice for the matter to be funded by the law practice subject to the control of the court because without such an order the matter may not be able to proceed and the benefits of a group proceeding to the interests of justice would be unattainable.

16 A number of recent decisions of this Court have articulated the principles applicable to s 33ZDA.[7] While it is not necessary to reiterate those principles in full, I consider the following to be particularly relevant to this application.

17 The regime provided by s 33ZDA is an exception to the general prohibition upon contingency fees, whereby a law practice purports to calculate legal costs by reference to the amount of any award or settlement or the value of any property that may be recovered.[8] Contingency fees can be contrasted with conditional billing or no win, no fee arrangements, where legal costs only become payable to the law practice if a successful outcome is achieved in the proceeding and such costs may include

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7 *Fox v Westpac Banking Corporation* (2021) 69 VR 487 (Nichols J) ('***Fox***'); *Allen v G8 Education Ltd* [2022] VSC 32 (Nichols J) ('***Allen***'); *Bogan v Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (John Dixon J) ('***Bogan***'); *Nelson v Beach Energy Ltd* [2022] VSC 424 (Nichols J) ('***Beach***'); *Lay v Nuix Ltd* (2022) 167 ACSR 27 (Nichols J); [2022] VSC 479 ('***Nuix***'); *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) ('***Noumi***'); *Mumford v EML Payments Limited* [2022] VSC 750 (Delany J) ('***Mumford***'); *DA Lynch v Star Entertainment Group* [2023] VSC 561 (Nichols J) ('***Star***'); *Norris v Insurance Australia Group Ltd* [2024] VSC 76 (Nichols J) ('***IAG***'); *Kilah v Medibank Private Limited* [2024] VSC 152 (Attiwill J) ('***Medibank***'); *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173 (M Osborne J) ('***Raeken***').

8 *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 s 183 ('**LPUL**').

additional fees such as uplift fees.[9] However, as explained by Nichols J in *Fox*, s 33ZDA only permits contingency fees to a limited extent, as ordered by the Court and as otherwise in keeping with each element of s 33ZDA. As her Honour observed, '[a]lthough that part of the provision permitting the calculation of fees as a percentage of moneys recovered is novel, the regulation by courts of charges made by lawyers for legal work done, is not'.[10]

18 Justice Nichols aptly summarised the purpose of s 33ZDA in *Allen*:[11]

> [T]he purpose of s 33ZDA may be broadly described in the terms expressed in the second reading of the Bill introducing the provision, namely, to enhance justice by reducing potential barriers to commencing class actions in the Supreme Court of Victoria. Section 33ZDA sits within Part 4A of the Act, which permits and governs the conduct of group proceedings in this Court. The principal object of that Part is enhancing group members' access to justice.

19 The mechanics by which s 33ZDA reduces the barriers faced by claimants wishing to commence a group proceeding were explained by John Dixon J in *Bogan*:[12]

> Enabling a law practice to charge contingency fees in representative proceedings, can promote access to justice by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim, to reduce costs to group members by having a single fee, and to provide transparency and simplicity.

20 The statutory criterion for making a GCO is 'open-textured' and provides the Court with a large measure of significantly unguided discretion.[13] Determining whether to make a GCO requires a 'broad, evaluative assessment'.[14] In making that assessment, the question whether to make an order and the question what is the rate that ought be set by the order, will be intertwined.[15]

21 The Court has the widest possible power to do what is appropriate to achieve justice

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9 *Bogan* (n 7) [12](g) (John Dixon J). Both conditional billing and uplift fees (up to 25%) are lawful under ss 181–2 of the LPUL (n 8). See also LPUL (n 8) s 6 (definition of 'uplift fee').

10 *Fox* (n 7) 495 [17].

11 *Allen* (n 7) [23] (citations omitted). See also Second Reading Speech (n 1) 4589–90.

12 *Bogan* (n 7) [93] (John Dixon J). See also Explanatory Memorandum (n 1) 2; Second Reading Speech (n 1) 4589.

13 *Bogan* (n 7) [13](a) (John Dixon J); *Fox* (n 7) 497 [24] (Nichols J); *Allen* (n 7) [18] (Nichols J); *Star* (n 7) [27] (Nichols J); *Raeken* (n 7) [10] (M Osborne J); *IAG* (n 7) [14] (Nichols J).

14 *Bogan* (n 7) [13] (John Dixon J); *Fox* (n 7) 491 [8](a) (Nichols J); *Allen* (n 7) [20], [31] (Nichols J); *Noumi* (n 7) [69] (Nichols J).

15 *Fox* (n 7) 499 [33] (Nichols J); *Allen* (n 7) [20] (Nichols J).

in the circumstances and there is no presumptive caution in exercising the discretion to make a GCO.[16]

22 In making its evaluative assessment, the interests of the group members are a primary consideration and the Court must be astute to protect their interests.[17] Price (or the costs group members are likely to pay) is relevant, but not the only consideration.[18] A GCO may (but not must) be put in place early in the life of a proceeding.[19] An order that is appropriate to ensure that justice is done in the proceeding will require fairness and equity and must not unjustly affect the interests of any party to the proceeding.[20]

23 The Court must be satisfied that making a GCO is appropriate or necessary to ensure that justice is done in the proceeding,[21] in terms adapted to that purpose.[22] Each of the words *appropriate* and *necessary* has separate work to do:[23] 'appropriate' means suitable, fitting or proper in the circumstances; 'necessary' depends on the context and identifies a connection between the GCO and the purpose of ensuring that justice is done in the proceeding;[24] and to 'ensure' means to make certain of something and also depends on context. The purpose of ensuring 'that justice is done in the proceeding' should be understood in the context of the provision. In particular, this includes that the purpose of s 33ZDA is to enhance justice by reducing potential barriers to advancing a class action, noting that s 33ZDA sits within Part 4A of the Act, the

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16 *Beach* (n 7) [38] (Nichols J); *Bogan* (n 7) [12](b) (John Dixon J); *Allen* (n 7) [18] (Nichols J); *Fox* (n 7) 497 [25], 500–1 [38] (Nichols J); *Raeken* (n 7) [10] (M Osborne J).

17 *Bogan* (n 7) [13](c)(i)–(v) (John Dixon J); *Allen* (n 7) [21] (Nichols J); *Fox* (n 7) 499 [34] (Nichols J); *Raeken* (n 7) [13] (M Osborne J).

18 *Bogan* (n 7) [13](c)(i)–(v) (John Dixon J); *Allen* (n 7) [24] (Nichols J); *Fox* (n 7) 491 [8](a) (Nichols J); *Raeken* (n 7) [16] (M Osborne J).

19 *Bogan* (n 7) [12](d) (John Dixon J); *Allen* (n 7) [26] (Nichols J); *Fox* (n 7) 496 [22] (Nichols J).

20 *Raeken* (n 7) [14] (M Osborne J), citing *Fox* (n 7) 500 [36] (Nichols J). See also *Allen* (n 7) [22] (Nichols J).

21 *Allen* (n 7) [18] (Nichols J); *Bogan* (n 7) [13](a) (John Dixon J); *Raeken* (n 7) [7], [10] (M Osborne J); *IAG* (n 7) [14] (Nichols J), citing *Fox* (n 7) 499 [31] (Nichols J); *IAG* (n 7) [18] (Nichols J); *Star* (n 7) [27] (Nichols J); *Medibank* (n 7) [11] (Attiwill J), citing *Noumi* (n 7) [53] (Nichols J).

22 *Bogan* (n 7) [13](c)(i)–(v) (John Dixon J); *Allen* (n 7) [20], [31] (Nichols J); *Fox* (n 7) 499 [33] (Nichols J); *Raeken* (n 7) [12] (M Osborne J); *IAG* (n 7) [14] (Nichols J).

23 *Bogan* (n 7) [13](b) (John Dixon J); *Allen* (n 7) [19] (Nichols J); *Fox* (n 7) 498–9 [29]–[30] (Nichols J); *Raeken* (n 7) [11] (M Osborne J).

24 *Raeken* (n 7) [11] (M Osborne J).

principal object of which is to enhance group members' access to justice.[25]

24 Section 33ZDA implicitly permits the linking of risk and reward in the calculation of fees.[26] Specifically, the calculation of an appropriate or necessary percentage may properly take into account not only the value of the legal services performed, but the value of a reasonable return to the law practice for the financial risk assumed by it.[27] Considerations of proportionality and reasonableness are not substitutes for the statutory test, but may assist in answering the statutory question when it comes to setting a percentage rate.[28] Justice Nichols explained in *Beach* that:[29]

> [T]he relationship between the assumption of financial risk and return on that investment is far from the only consideration that will inform the appropriateness of a percentage rate ultimately fixed, including by amendment under s 33ZDA. … [M]aking a Group Costs Order serves to fix the method of calculation of legal costs in which, among other things, consideration of the legal work that has been done will be a relevant integer. The assumption of risk by a law firm who conducts the proceeding is but one element of the equation. Investment analysis tools might assist to measure that element in a principled way. … How those considerations fall to be weighed in any given case remains to be seen, and can only be assessed meaningfully in the context of the facts of a particular case.

25 Although not determinative, the Court may consider counterfactual funding arrangements that might be available to plaintiffs and group members in evaluating whether a GCO is appropriate or necessary.[30] As Nichols J stated in *Beach*:[31]

> [W]hether or not a proposed GCO is more beneficial to group members than an alternative funding model is not a proxy for the statutory test, and s 33ZDA does not, as a matter of construction, necessarily require that a GCO yield a better outcome than a counter-factual funding arrangement. A price comparison between the proposed GCO and the most likely alternative

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25 *Bogan* (n 7) [12](j) (John Dixon J); *Allen* (n 7) [23] (Nichols J); *Fox* (n 7) 496 [21]; *Raeken* (n 7) [10], [15] (M Osborne J).

26 *Allen* (n 7) [28] (Nichols J); *Fox* (n 7) 495–6 [20] (Nichols J); *Bogan* (n 7) [12](f) (John Dixon J); *IAG* (n 7) [18] (Nichols J).

27 *Bogan* (n 7) [12](f) (John Dixon J); *Allen* (n 7) [28] (Nichols J); *Fox* (n 7) 495–6 [20] (Nichols J); *Raeken* (n 7) [20] (M Osborne J); *IAG* (n 7) [18] (Nichols J) citing *Noumi* (n 7) [53](a)–(f) (Nichols J), adopted in *Mumford* (n 7) [14] (Delany J); *Maglio v Hino Motors Sales Australia Pty Ltd* [2023] VSC 757, [99] (M Osborne J). See also VLRC Report (n 1) 63 [3.67].

28 *Raeken* (n 7) [21] (M Osborne J), citing *Fox* (n 7) 529–30 [145]–[148] (Nichols J); *Allen* (n 7) [29] (Nichols J); *IAG* (n 7) [18] (Nichols J).

29 *Beach* (n 7) [49].

30 *Allen* (n 7) [93] (Nichols J); *Beach* (n 7) [27] (Nichols J); *Noumi* (n 7) [37]–[39] (Nichols J); *Raeken* (n 7) [34] (M Osborne J); *Bogan* (n 7) [37], [84]–[85], [88] (John Dixon J); *Mumford* (n 7) [34], [80] (Delany J); *Thomas v The a2 Milk Company Ltd* [2023] VSC 768, [42]–[49] (M Osborne J) ('***a2 Milk***').

31 *Beach* (n 7) [27] (citations omitted).

funding model is certainly a relevant consideration but must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA.

D. RELEVANT FACTS

26 Prior to this application, PFM had discussions with two different potential third-party litigation funders. The details of those potential funders and communications are confidential, but ultimately they did not result in any agreements with third-party litigation funders.[32] It is now Mr Finney's opinion, based on his experience with those two litigation funders and his extensive prior experience in funded shareholder class actions, that it is unlikely that viable alternative offers of funding will be forthcoming.[33]

27 It was Mr Finney's view that some group members' claims would arguably begin to expire from 8 November 2023 due to the operation of statutory limitation periods.[34] In light of the time limitation and the lack of funding arrangements with potential litigation funders, PFM decided to fund the proceeding in the interim on the basis that it would seek a GCO at a rate in the range of around 39–40%.[35]

28 On 27 October 2023, Dr Gawler entered into a conditional legal costs agreement ('**CLCA**') with PFM.[36] According to the terms of the CLCA, PFM is acting on a no win, no fee conditional basis pending the determination of a GCO application. PFM has also provided the plaintiff with an adverse costs indemnity in respect of costs incurred up to the determination of the GCO application.[37]

29 The proceedings commenced on 6 November 2023 by PFM, with an Amended Statement of Claim filed on 8 February 2024. On 6 November 2023, it was disclosed to group members via the Group Proceeding Statement filed in the Court and displayed on PFM's website that the plaintiff intended to seek a GCO.[38]

30 The terms of the CLCA provide that, if the Court determines not to make a GCO, then,

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32 Plaintiff's Submissions, [24]–[25].
33 First Finney Affidavit, [50].
34 Ibid [49].
35 Plaintiff's Submissions, [25].
36 The CLCA is exhibited to the First Finney Affidavit, RAG 11–42 ('**CLCA**').
37 First Finney Affidavit, [9].
38 Ibid [22].

unless PFM notifies the plaintiff within seven days of its intention to seek alternative funding arrangements, the CLCA will terminate.[39] Clause 15.1 of the CLCA also provides PFM with the right to terminate the CLCA if reasonably satisfied that the proceeding does not enjoy sufficient 'Costs Support', which is defined to include a GCO and a decision by PFM that the litigation is economically viable.[40]

31 It is mutually understood between Dr Gawler and PFM that:

(a) if a GCO is made, PFM will have a right to terminate the CLCA if the GCO is made at a rate which is not acceptable to PFM; and

(b) if a GCO is not made, PFM will notify Dr Gawler within seven days if it intends to seek third party funding, failing which the CLCA will terminate.[41]

32 Evidence was led as to Dr Gawler's and PFM's intentions moving forward. Dr Gawler's evidence is that he would not be able to pay PFM's professional fees or disbursements, nor would he be willing to take on the risk and burden of an adverse costs order.[42] On Mr Finney's evidence, PFM would not be prepared to provide an ongoing indemnity for adverse costs or to effectively fund the proceedings on a no win, no fee basis.[43] That evidence together suggests that, if the Court declines to make a GCO at the rate sought and if alternative third-party funding is not available (which, as it currently stands, it is not), the proceeding would likely be discontinued — PFM would not be prepared to provide an ongoing indemnity for adverse costs and the plaintiff would not be prepared to continue without it.[44]

E. PLAINTIFF'S SUBMISSIONS

33 The plaintiff advanced the following submissions as to why the GCO sought is necessary and appropriate to ensure that justice is done in the proceeding.

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39 CLCA (n 36) cl 4.1(b).
40 Ibid cls 15.1(c), 17 (definition of 'Costs Support').
41 Gawler Affidavit, [19](a).
42 Plaintiff's Submissions, [33]; Gawler Affidavit, [25](a)–(b).
43 Plaintiff's Submissions, [34]; First Finney Affidavit, [115], [118](a), [119](f).
44 Plaintiff's Submissions, [4](k), [35]; Transcript of Proceedings (15 May 2024) 60.1–60.3.

(a) The GCO sought will offer simplicity, certainty and transparency.

(b) Despite extensive negotiations, PFM has been unable to secure an appropriate third-party litigation funding arrangement on terms which would be acceptable to group members and PFM. The evidence is that it is unlikely that any such arrangement is available.

(c) The contractual arrangement between the plaintiff and PFM is such that PFM is currently acting on a no win, no fee basis but only up until the determination of a GCO application. The effect of that contractual arrangement is that it can be terminated in the event that the GCO application is unsuccessful.

(d) PFM is not prepared to continue to act no win, no fee in the matter and provide an ongoing adverse costs indemnity to the plaintiff. The plaintiff is not prepared to continue without the benefit of that indemnity, nor can the plaintiff fund the proceeding himself or risk an adverse costs order. For those reasons, the ongoing viability of the proceeding is in question if the GCO sought is not granted.

(e) The rate sought of 39% is within the range of percentages previously ordered by the Court.

(f) The rate of 39% is reasonable and proportionate having regard to:

    (i) the total potential quantum of the claim and the likely size of any settlement or judgment;

    (ii) a risk/reward analysis;

    (iii) a comparison with likely outcomes of a funded proceeding (even though no such funding is in fact available); and

    (iv) comparisons to other GCOs ordered by reference to the size of those likely settlements or judgments.

(g) Mr Finney's evidence is that PFM would not continue to act if a lower GCO rate was ordered, beyond taking steps to assist the plaintiff to discontinue the proceeding.

(h) There is no other, better, option currently available to the plaintiff in the proceeding and there is a low likelihood of a better option becoming available.

(i) The power of the Court under s 33ZDA(3) to vary any rate ordered protects the group members against an unfair windfall gain to the law practice and permits a review of the reasonableness and proportionality of that rate at the conclusion of the proceeding.

F. CONSIDERATION

34 While in principle I am favourably disposed to making a GCO in this case, the question that has given me pause is whether the rate of 39% sought by the plaintiff is appropriate and necessary to ensure that justice is done in the proceeding.

35 In a research paper published in January 2024 entitled 'Group Costs Orders and Funding Commission', Professor Vince Morabito reviewed GCOs made by this Court prior to December 2023.[45] Since the introduction of s 33ZDA, GCOs have been granted by the Court in the range of 14% to 40%.[46] The median rate was 24.5% across all cases and 24% in shareholder class actions.[47] In 18.7% of cases in which GCO's have been sought, rates have been fixed between 25% and 29.99%. As at December 2023, 16 GCOs had been made. Since then a further three GCOs have been made at rates ranging from 27.5% to 30%.[48] The cases traversed a range of subject matter. Some had the involvement of a litigation funder and some did not. Some were made in the course of multiplicity contests.

36 The rate of 39% sought in this proceeding, while within the range of GCOs made to

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45 Vince Morabito, 'Group Costs Orders and Funding Commissions' (Report, January 2024). Professor Morabito's report was exhibited in the First Finney Affidavit, TMLF-1 522.

46 Ibid 19.

47 Ibid.

48 GCOs were granted in *Raeken* (n 7) at 27.5%, *Medibank* (n 7) at 27.5% and *IAG* (n 7) at 30%.

date, is at the very upper end of that range.

37 I accept the plaintiff's evidence that if a GCO at the rate of 39% is not made, there is a considerable risk, indeed a probability, that no alternative funding will be available and that the proceeding will be discontinued. The circumstances of this case are therefore similar to those considered by John Dixon J in *Bogan*. Justice cannot be done in the proceeding if the plaintiff and group members are not able to pursue their claims through the proceeding and must abandon them.[49] In those circumstances, I accept that a GCO at the rate of 39% is *necessary* to ensure that justice is done in the proceeding.

38 However, in this case the question that arises is whether a GCO at the rate of 39% is *appropriate* to ensure that justice is done in the proceeding.

39 Consider a hypothetical case where the evidence is that a law practice is only prepared to act if a GCO is made at a rate of 65% in circumstances where no alternative funding is available and unless a GCO is made at that rate the proceeding will be discontinued. In such a case a GCO, even at a rate of 65%, may be *necessary* if the plaintiff and group members are to have their day in court. But it is doubtful that such an order would be *appropriate*.

40 The purpose of s 33ZDA is to enhance access to justice by reducing potential barriers to commencing class actions, by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim and by reducing costs to group members.[50] The reasonableness and proportionality of legal costs incurred in civil proceedings are measures that are embedded in the legal context within which s 33ZDA is to be construed.[51] Justice at any cost may not be justice at all.

41 If the expression 'necessary or appropriate' in s 33ZDA is read disjunctively, then a

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49 *Bogan* (n 7) [105] (John Dixon J). See also *Bogan (Appeal)* (n 2) [53] (Ferguson CJ, Niall and Macaulay JJA).

50 *Allen* (n 7) [23] (Nichols J); *Bogan* (n 7) [93] (John Dixon J); See also Second Reading Speech (n 1) 4589–90.

51 *Fox* (n 7) 529 [146].

GCO could be made where the Court considered it was necessary but not appropriate, or appropriate but not necessary, to ensure that justice is done in the proceeding. This would not be consistent with the context and purpose of s 33ZDA.

42 The use of the word 'or' does not preclude a conjunctive construction where the context and purpose of the legislative provision requires it.[52] I consider that a conjunctive construction of the expression 'necessary or appropriate' is consistent with the context and purpose of s 33ZDA. It also recognises that each of the words *appropriate* and *necessary* has separate work to do.[53] Such a construction would mean that a GCO could be made only where the Court considered it was necessary *and* appropriate to ensure that justice is done in the proceeding.

43 I have not overlooked the fact that s 33ZF of the Act empowers the Court to make 'any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'. However, as Nichols J explained in *Fox*, although both ss 33ZF and 33ZDA employ some of the same language, the purpose of these provisions is quite different:[54]

> Unlike s 33ZF of the Act, whose cognates in Federal and New South Wales legislation were recently considered by the High Court in *BMW v Brewster*, s 33ZDA is not a supplementary or gap-filling power. Section 33ZF of the Act provides that, "in any proceeding … conducted under this Part the Court may, of its own motion or on an application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". Although the criterion for the exercise of power conferred by s 33ZDA also employs the words "appropriate or necessary to ensure that justice is done in the proceeding", those words do not condition a general power to make "any order" in the proceeding; they condition the exercise of the power to make a very particular kind of order (a GCO)… s 33ZDA does not "reflect the test" employed in s 33ZF. It employs some of the same language, but in a different context. The criterion for the exercise of the power must be read together with the grant of power itself. Some guidance might be gleaned from the reasoning in cases in which s 33ZF and its cognates have been considered by courts, but that reasoning cannot be applied as though s 33ZDA

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52 See, eg, *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107, 118 [37] (Kenny J); *Federal Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573, 577–8 [19]–[21] (Heerey, Hely and Hill JJ); *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474, 481–2 (Beach J). See also DC Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 10th ed, 2023) 74 [2.52], 75–6 [2.54].

53 *Bogan* (n 7) [13](b) (John Dixon J); *Allen* (n 7) [19] (Nichols J); *Fox* (n 7) 498–9 [29]–[30] (Nichols J); *Raeken* (n 7) [11] (M Osborne J).

54 *Fox* (n 7) 497–8 [27] (citations omitted). See also *Bogan (Appeal)* (n 2) [121]–[123] (Ferguson CJ, Niall and Macaulay JJA).

> and s 33ZF were provisions of the same or a substantially similar kind. They are plainly distinct and serve very different purposes.

44 Having considered the plaintiff's evidence and submissions, I am also satisfied that a GCO at the rate of 39% is appropriate to ensure that justice is done in the proceeding. Although the rate of 39% is at the very upper end of the range of GCOs made by the Court, it is appropriate for the following reasons.

45 First, despite extensive negotiations, PFM has been unable to secure an appropriate third-party litigation funding arrangement on terms which would be acceptable to group members and PFM. The evidence is that there is no other, better, funding option currently available to the plaintiff and it is unlikely that any such arrangement will become available.

46 Secondly, although it is *possible* that another funder would be willing to fund the proceeding, the costs and delay of any further search for a funder would cause material prejudice to group members. It would require PFM to fund the case on a no win, no fee basis in the interim, which PFM is not prepared to do. As such, the proceeding would need to be stayed indefinitely in the hope that the plaintiff could source alternative representation or funding offering a better return than the GCO sought here.

47 Thirdly, where third party litigation funding is utilised, the combined amount of legal costs and funding commissions deducted from group members' awards or settlements has historically been higher than the GCO rate proposed by the plaintiff. As John Dixon J noted in *Bogan*, the median combined commission and costs proportion in shareholder class actions was 46%.[55] Moreover, as shown by the data published by Delany J in *Mumford*, in 20 out of 30 funded class actions settled between 2001 and 2020, legal fees and litigation funder commissions comprised more than 40% of the settlement sum and in 28 out of 30, they were more than 30%.[56] The plaintiff submitted, and I accept, that such historical trends demonstrate that the procurement of a third-party funding arrangement would be very unlikely to improve the position

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55 *Bogan* (n 7) [70].

56 *Mumford* (n 7) [48], Annexure A (Delany J).

for group members in this proceeding.[57]

48 Fourthly, a rate of 39% is reasonable and proportionate on the basis of a risk/reward analysis. In *Bogan*, John Dixon J accepted that s 33ZDA permits reward for risk because it requires the assumption of risk and that reward for risk should be assessed in a principled way, while noting the inherent difficulty of doing so on an *ex ante* basis.[58] His Honour recognised that it is both fair and reasonable for a law practice to seek a risk premium (including what his Honour described as a pure risk premium) and noted that the investment in complex litigation could be equated with a venture capital investment where higher returns in the order of 20–30% are required to attract capital.[59] The relevant risk that PFM would be assuming if it continued to litigate this proceeding is the risk that *all* costs involved in the proceeding will be incurred, including both the plaintiff's legal costs and the defendant's party–party costs if the matter is unsuccessful. The relevant reward is the amount sought to be obtained through the GCO as the potential compensation for assuming that risk. The plaintiff's submissions as to the likelihood of that risk eventuating and the quantum of PFM's potential reward, are understandably confidential and are dealt with in the confidential annexure to this ruling. Having reviewed those submissions and the plaintiff's evidence, I am satisfied that, although high, a rate of 39% is proportionate to the risk assumed by PFM considering the potential award or settlement that may reasonably be expected at this stage in the proceeding.

49 Fifthly, the GCO will provide certainty for the plaintiff and group members that, subject to further order, the total amount of legal costs that will be deducted from any resolution sum is 39% and that they will therefore get a return of 61%. While the plaintiff and the group members cannot know the quantum of any successful recovery at this early stage in the proceeding, the granting of a GCO will provide certainty in respect of the overall percentage deductions for costs.

50 Sixthly, the GCO will promote equality of outcome as between the group members by

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57 Plaintiff's Submissions, [63].

58 *Bogan* (n 7) [15]–[30]. See also *Star* (n 7) [29] (Nichols J); *Medibank* (n 7) [12] (Attiwill J).

59 *Bogan* (n 7) [25], [27].

virtue of s 33ZDA(1)(b).

51 Seventhly, the GCO will have the effect of aligning PFM's interest in achieving a reasonable return for the investment and risk undertaken by them with the interests of the plaintiff and the group members.

52 Finally and of particular importance, I take into account the Court's power during the course of the proceeding to amend any previously ordered GCO percentage rate pursuant to s 33ZDA(3). This is a case where the Court ought to give particular attention as to whether an order should be made at a subsequent date, reducing the GCO percentage rate once the Court has further information concerning the quantum of any award or settlement, the amount of legal costs actually incurred and any other relevant matters. This will ensure that any GCO made continues to be appropriate and necessary to ensure that justice is done in the proceeding.

53 Justice Nichols' statement in *Allen* is particularly relevant here:[60]

> The plaintiffs' solicitors should be mindful of the need to facilitate any future assessment on questions concerning the appropriate reward for the assumption of risk, which is by its nature a forward-looking decision made now, but which might be later evaluated by reference to the facts and assessments that informed the decision to assume the risk, made at this point in time. There may well be other measures of reasonableness and proportionality which will require reference to what will be past events, at the time at which any s 33ZDA(3) question arises.

G. CONCLUSION AND ORDERS

54 For these reasons I will make a GCO pursuant to s 33ZDA(1) which fixes the percentage at 39%. That percentage may be re-assessed at a later time pursuant to s 33ZDA(3).

55 I will make the following orders:

(a) The legal costs payable to the solicitors for the plaintiff and group members, Phi Finney McDonald Pty Ltd, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding.

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60 *Allen* (n 7) [92].

(b) Subject to further order, the percentage referred to in paragraph 55(a) be 39%.

(c) Liability for payment of the legal costs pursuant to paragraphs 55(a) and (b) be shared among the plaintiff and all group members.

(d) The defendant's costs of the application be reserved.

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for ruling of Justice Waller of the Supreme Court of Victoria delivered on 26 June 2024.

DATED this twenty sixth day of June 2024.